Court of Appeals of Kentucky.

LOUISVILLE COFFIN CO. *v.* L. L. WARREN ET AL.

Where a building has been erected at a large expense and used for the same purpose for many years, a chancellor will not enjoin such use at the suit of an adjoining owner, except in a plain case of nuisance and of irreparable injury.

Mere inconvenience and annoyance, such as is incident to every case in which manufacturing is carried on in a city, will not be sufficient ground for such injunction.

While a mere acquiescence in the existence of a nuisance for seven years, or even a longer time, will not ordinarily preclude the party from abating it, still when one stands by and permits the erection of buildings and their use for the purposes for which they were constructed for seven years, it becomes very persuasive evidence that the injury complained of is such as is incidental to like improvements and common to the whole surrounding population.

APPEAL from the Louisville Chancery Court.

This was a petition by residents of certain property in the city of Louisville, praying for an injunction against defendants from operating a factory, the smoke and cinders from which injured complainants' property. An answer was filed and testimony taken. The court below granted the injunction, whereupon defendants appealed. The facts are fully stated in the opinion.

A. Casey and *A. Duvall*, for appellants.

H. C. Pindell and *George M. Davie*, for appellees.

The opinion of the court was delivered by

PRYOR, C. J.—This action was instituted by L. L. Warren and others, in the Louisville Chancery Court, against the Louisville Coffin Company, alleging, in substance, that the issue of smoke, soot and cinders from the smoke-stack of the defendants' factory is a nuisance to the plaintiffs, who live in the vicinity of the factory, and own the property in which they reside. They sought and obtained an injunction in the action, and from that judgment this appeal was taken.

The ground upon which the appellants' factory stands is in the interior of the square bounded by Walnut, Third, Chestnut and Fourth streets; Warren's residence is on the corner of Fourth and Walnut; Pindell's residence is between Third and Fourth on Walnut; the latter is the owner also of two houses on Third street. Warren and Pindell are the appellees here, and were the plaintiffs below.

Some four or five years prior to the institution of the action, the appellants became the purchasers of a lease covering a part of the ground within the square already described, and have erected upon it valuable improvements in the way of buildings, in which has been placed costly machinery for the execution of the work on which they are engaged. The factory is a substantial brick building, three stories high, and the cost of its construction, including the machinery, is not less than $15,000. The smoke-stack, of which the complaint is made, was erected in the year 1870, and has been in use since that date; is fifty-five feet in height, and overlooks the buildings surrounding it. It is alleged in the petition that the machinery of the factory is propelled by steam, and that a column of smoke, soot and burning embers pours almost constantly from the smoke-stack, and frequently the smoke, soot and cinders are carried by the wind over the premises of the plaintiffs, enveloping their windows and doors, and rendering the atmosphere unwholesome for respiration; that their buildings are in danger from the burning embers, and their tenant-houses less valuable for rental, &c.; that the factory is located in the midst of a square almost entirely occupied by buildings for residences and light fancy stores; that some of the buildings have taken fire from the embers emanating from the smoke-stack, and the rates of insurance have been greatly increased.

These allegations are denied by the answer, and by way of defence it is also alleged that a steam planing-mill was continuously operated on this ground for three years prior to the purchase made by the appellants, and that appellants used the same steam-power and smoke-stack in the mill and factory that had been used on the leasehold during the last seven years past, and the volume of smoke, soot, &c., was no greater than it had been during the entire period. They allege the use of every precaution to prevent an injury to appellees' property, and deny any other injury than the annoyance that such buildings and machinery must necessarily cause; that their property cannot be removed without destroying its value, nor their business continued without the aid of steam-power.

The depositions of many witnesses have been taken in the case, and much conflicting testimony is presented in the record as to the effect the operating of appellant's factory has on the adjacent property, as well as the extent of the injury and annoyance resulting

to those who occupy residences on this square. The discomfort produced by smoke, soot, &c., from the running of large factories in cities, has not, perhaps, been exaggerated by those who have testified; and with reference to the particular case, when looking alone to the testimony offered by the appellees, it can scarcely be maintained that the only injury sustained is the annoyance usually incident to such buildings. This testimony, however, when considered in connection with that offered by the appellant, leaves the mind in doubt as to whether the parties complaining have sustained any substantial injury. The rule that "any interference with our neighbor in the comfortable enjoyments of life is a wrong which the law will redress," must be considered in its application with reference to the condition in which the party has placed himself who is making the complaint. One living in a city must necessarily submit to the annoyances which are incidental to a city life. It must be recollected that manufacturing establishments are necessary and indispensable to the growth and prosperity of every city; and while the cleanliness and beauty of that part of a city adorned by costly edifices may be marred by the erection of the foundry or the machine-shop, and the comforts of life to some extent interfered with by the hum and noise of machinery, still the manufacturing interest, upon which its prosperity depends, requires protection, and individual comfort must yield to the public good. The testimony on the part of the appellees conduces to show much annoyance and discomfort caused by the smoke and soot issuing from the smoke-stack of appellant's factory, while, on the other hand, it appears that appellants have used the modern appliances for the consumption of smoke and the burning embers, so as to insure the safety of the adjoining property and lessen the annoyances that are ordinarily caused to those living contiguous to such establishments. The smoke-stack is in the rear of the buildings in which the appellees live and a distance of near two hundred feet from the front of either residence. The mouth of the stack is far above their buildings, and has been continually used on the same ground for seven years prior to the time at which the injunction was granted. In May 1875, in order to remove the complaint made in regard to the falling embers, all the steam was made to escape through the stack, destroying in that manner the sparks and burning embers. The factory is well managed, and the alleged nuisance is evidently no greater than is being caused to all

who occupy residences near large factories operated by steam. The appellees prior to 1875, may have had reason to anticipate danger from the sparks and cinders that were occasionally emitted from the mouth of the smoke-stack. Since that time a steam-pipe having been inserted in the smoke-stack, the decided weight of the testimony conduces to show that the steam dampens the soot and embers, causing them to fall near the stack.

This factory cannot be regarded a greater nuisance than the other manufacturing establishments within the city, using steam-power and having smoke-stacks attached to their buildings. If the injunction is made perpetual in this case, the precedent established would, in effect, destroy the manufacturing interests in the city of Louisville. The owners of family residences would, in most instances, object to the erection or continuance of such factories adjoining their homes, and if aided by the chancellor in having them removed, would destroy all manufacturing interests, or require the location of such buildings in a part of the city remote from the private residences of the inhabitants. The location of such buildings within a city is a mere question of policy by those controlling the municipal government; and the chancellor would be reluctant to interfere by injunction, except in cases where irreparable injury would result in the absence of such relief. In this case the chancellor is asked to restrain the appellants from operating a factory that has been running in the same locality for years without any serious damage to the owners of the property adjacent, and where the effect is to destroy entirely the business of the appellant; it would be more equitable to interfere to prevent its construction than to permit the expenditure and then destroy the value of the property by denying to the appellants the right to use it. Whether or not a court of equity would have prevented the erection of the building on the ground that the part of the city in which it is located had been set apart by common consent for private residences, is not necessary to be determined. In this case the buildings have been erected and a large expenditure made, amounting to $15,000 or $20,000. The business in which appellants are engaged is lawful. It is not shown that the health of the appellees or their families is affected by it, or that the atmosphere is rendered unpleasant, except from the smoke at certain periods when the wind is blowing in the direction of appellees' houses. This condition of things is realized in nearly the entire central part of the city, all of the inhabitants being

more or less annoyed by the smoke and soot settling on their premises. The right of the chancellor to grant an injunction where the injury is irreparable cannot be questioned, but on the facts of this case this power should not have been executed. While a mere acquiescence in the existence of a nuisance for seven years, or even a longer time, will not ordinarily preclude the party from abating it; still, when one stands by and permits the erection of buildings, as in this case, and their use for the purposes for which they were constructed for seven years, it becomes very persuasive evidence that the injury complained of is such as is incidental to like improvements and common to the entire population on this square. Some of the residents find no evil results from the location and erection of the factory, while others regard it as a nuisance. In the case of *Robinson* v. *Baugh*, 31 Mich. 290, which goes further in sustaining the judgment below than any case to which our attention has been called, the opinion is based on the fact that the nuisance complained of caused substantial injury to the dwellings, and affected not only the comfort but the health of the residents. Besides, the defendant's works in that case had been in operation but a short time, were not expensive or of a permanent character, and could be removed without much inconvenience or cost.

In that case it is said: "Extreme claims must give way, and men must yield somewhat in a spirit of accommodation and concession, and measurably recognise and respect the actual exigencies of time, place and circumstances." The case of *Rhodes* v. *Dunbar*, 57 Penn. St. 274, is somewhat analogous to the case being considered. That was a bill to restrain the owner of the property from reconstructing a planing-mill which had been destroyed by fire, and while being operated had caused much annoyance and discomfort to the owners of the adjacent property by reason of the smoke, soot and embers issuing from the chimneys of the factory. The court discharged the injunction, and one of the grounds assigned was that such annoyances and inconveniences are incidental to city life.

In the present case the proof shows that with the escape of steam through the smoke-stack the danger of fire is removed and the annoyance greatly lessened, and much of the testimony introduced by the appellees applies to the condition of the property previous to the making of this improvement. We think in a case like this, where the property has been used for the same purposes for a number of years, and expenditures made that if rendered useless must

result in the financial ruin of the owners, the application for an injunction must be sustained by strong and convincing testimony; in other words, a plain case of nuisance, and with it irreparable injury must be established. While the inconveniences and annoyances to the two appellees in this case must be conceded to exist, the facts developed do not authorize an interference by the chancellor, and the judgment below is therefore reversed with directions to dismiss the petition.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]
ENGLISH COURTS OF LAW AND EQUITY.[2]
SUPREME COURT OF PENNSYLVANIA.[3]
COURT OF ERRORS AND APPEALS OF NEW JERSEY.[4]

ADMIRALTY.

Salvage—Joinder of actions in rem and in personam—Volunteer Service.—Salvors cannot proceed against a ship and cargo *in rem*, and against the consignees of the cargo *in personam*, in the same libel: *Steamboat Mayflower* v. *Steamboat Sabine*, S. C. U. S., Oct. Term 1879.

An action *in personam* for salvage cannot be maintained against the owner of the property saved unless the service was performed at his request. *Id.*

AGENT. See *Broker.*

ASSIGNMENT. See *Negotiable Instruments.*

ATTORNEY. See *Criminal Law.*

Purchase by, at sale of Client's Property—When sustained.—While purchases at judicial sales in the name of the solicitor for the party whose property is sold will be scrutinized with jealous care, they will be sustained if no injustice is thereby done to such party: *Pacific Railroad Co.* v. *Ketchum*, S. C. U. S., Oct. Term 1879.

BAILMENT.

Pledgor and Pledgee—Goods obtained by Fraud from Pledgee and repledged.—D. & Co. deposited certain goods with the plaintiffs as security

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[1] Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1879. The cases will probably be reported in 11 Otto.

[2] Selected from late numbers of the Law Reports.

[3] From A. Wilson Norris, Esq., Reporter; to appear in 90 Penna. St. Reports.

[4] From Hon. John H. Stewart, Reporter; to appear in 32 N. J. Eq. Reports.